

McGuire Steel Erection, Inc. and Steel Enterprises, Inc., and Local 25, International Association of Bridge, Structural and Ornamental Ironworkers, AFL-CIO. Case 7-CA-37401

August 12, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX
AND HIGGINS

On February 21, 1997, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Charging Party filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, to amend the remedy, and to adopt the recommended Order as modified.

The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing and failing to provide the Union with the relevant information which it requested.

As a part of his proposed remedy, the judge recommended that the Respondent be required to reimburse the Union for its expenses incurred in the investigation, preparation, presentation, and conduct of the instant case. However, under Board precedent such a remedy is warranted only in cases involving frivolous defenses and cases involving unfair labor practices that are flagrant, aggravated, persistent, and pervasive. See *Frontier Hotel & Casino*, 318 NLRB 857, 862 (1995), enf. denied sub nom., *Unbelievable, Inc.*, 118 F.3d 795 (D.C. Cir. 1997). If a respondent's defenses are rejected on the basis of credibility resolutions, they may be deemed to be debatable and, if debatable, the award of litigation expenses is not appropriate under the "frivolous" prong. *Heck's Inc.*, 215 NLRB 765, 766, 768 (1974); *Frontier Hotel*, supra, 318 NLRB at 861.

Here, the Respondent's defense contained elements that turned on credibility resolutions in regard to whether it had provided all of the requested information. Thus, although we have found, in agreement with the judge, that the Respondent's defenses are without merit, we do not find that they are frivolous.

Turning to the character of Respondent's misconduct, we note that the judge found, and we agree, that the Respondent failed to provide relevant information to the Union despite the Union's repeated re-

quests. We do not excuse or minimize the seriousness of the unfair labor practices which we have found. We do not, however, find that the Respondent's unfair labor practices were so flagrant, aggravated, persistent or pervasive, as to warrant the imposition of the extraordinary remedy. Therefore we do not adopt the judge's recommendation that the Respondent be required to reimburse the Union for its litigation expenses. See *Frontier Hotel*, supra.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, McGuire Steel Erection, Inc. and Steel Enterprises, Inc., Brighton, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraph 2(c) and reletter the subsequent paragraphs accordingly.

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail or refuse to provide Ironworkers Local 25 information regarding payments made to bargaining unit members by Steel Enterprises, Inc. or any other information which is relevant to, and necessary for Local 25's performance of its function as the exclusive collective-bargaining representative of the unit described below:

All journeymen, apprentices, foremen, acting general foremen and general foremen employed as structural ironworkers, ornamental ironworkers, welders, precast erectors, sheeter, and bucker-ups, and conveyor ironworkers employed by members of the Great Lakes Fabricators and Erectors Association, members of the Associated General Contractors of America, Detroit Chapter, Inc., and members of the Michigan Conveyor Manufacturers Association, Inc., and by employers who have authorized any of said associations to bargaining on their behalf, but excluding all guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

WE WILL provide to the Union all information it requested on January 11, 1995, May 16, 1995, and July 5, 1995, regarding payments made to bargaining unit members or other individuals by Steel Enterprises, Inc. from June 1, 1991, to the present, including but not limited to payroll registers and check registers.

MCGUIRE STEEL ERECTION, INC. AND
STEEL ENTERPRISES, INC.

Patricia A. Fedewa, Esq., for the General Counsel.

Noah Yanich, Esq. (Jacob & Weingarten, P.C.), of Troy, Michigan, for the Respondent.

Samuel C. McKnight, Esq. (Klimist, McKnight Sale, McClow & Canzano, P.C.), of Southfield, Michigan, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Detroit, Michigan, on October 28–29, 1996. The charge was filed July 6, 1995,¹ and the complaint was issued September 29. The General Counsel and the Charging Party allege that Respondent refused to provide the Union with the payroll records of Steel Enterprises despite numerous requests. Respondent contends that it did provide and make available all the documents requested.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by all three parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

McGuire Steel Erection, Inc., a corporation, is a structural steel erector in Brighton,² Michigan, where it annually purchases and receives at its Michigan jobsites goods valued in excess of \$50,000 directly from points outside of the State of Michigan. Steel Enterprises, Inc., is a payroll processing company for employees of McGuire Steel Erection and related companies. McGuire Steel Erection, Inc., and Steel Enterprises, Inc. admit, and I find that they are for purposes of this case a single business enterprise and a single employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. They also admit and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Local 25 (the Union) has been the designated exclusive bargaining representative of McGuire Steel Erection's ironworkers since at least 1990. On June 2, 1994, Gregory Hicks, the Union's business manager and its attorney, Samuel McKnight, met with Daniel McGuire, president of McGuire Steel Erection. The three men discussed information received by Hicks that some members of the Union were being paid

by Steel Enterprises for work covered by the Union's collective-bargaining agreement with McGuire Steel. The Union has never had a collective-bargaining agreement with Steel Enterprises, which is owned by Dan McGuire and his brother John.³ Payments to the Union's fringe benefit funds were not being made on salary payments made to ironworkers by Steel Enterprises.

Dan McGuire promised to look into the matter. Attorney McKnight told McGuire that he would need to see the payroll records or check registers of McGuire Steel, Steel Enterprises, and Dumas/McGuire, a joint venture covered by a collective-bargaining agreement with the Union. Five days later, Ellen Moss, a partner in McKnight's law firm followed up the meeting with a letter to McGuire (Jt. Exh. 1). Moss informed Respondent that the Union needed:

1. Payroll records from Steel Enterprises, Inc. for all Iron Work or work performed by Iron Workers for the time period January 1, 1992 to the present [June 7, 1994].

2. Any and all records in the possession of Steel Enterprises that indicate work performed by Iron Workers or Iron Work performed including the jobsite, the amount of work performed at this site, the type of work performed at this site, the names of the employees that performed the work at this site and the dates work was performed for the time period January 1, 1992 to the present.

Three weeks later, not having heard from McGuire, Moss wrote to ask if he was planning on responding. McGuire replied on July 5, 1994. He stated that he was the only one capable of reviewing the documents and that given the number of documents and his father's illness, it would take him some time to do so. McGuire did promise to respond as soon as possible.

Five months passed without a response. Moss wrote McGuire again on December 14, 1994. Respondent then sent the Union a summary of payments to various individuals for three 1-year periods beginning June 1, 1991, and ending May 31, 1994. Some daily timesheets for these individuals were also provided (G.C. Exhs. 2–4).

Moss wrote again to McGuire and his attorney Harry Eisenberg on January 11, 1995. She told them that the information provided was insufficient and that the Union would need to see "the actual payroll records for these individuals, including their W-2 forms" as well as payroll records for McGuire Steel and Dumas/McGuire. Moss also asked for documentation of payments made by Steel Enterprises to the Iron Workers Fringe Benefit Funds for this 3-year period.

On January 27, 1995, Moss went to the offices of McGuire Steel where she was shown four to six boxes of records for McGuire Steel and Dumas/McGuire by Jennifer Prebenda Dupuie, then Respondent's human resources director.⁴ Moss spent about a half hour looking at these records and then left. She did not look at any Steel Enterprises records because she was told by Dupuie that these records

³ Daniel McGuire is president of Steel Enterprises, McGuire Steel Erection, Dumas/McGuire, a joint venture, and two other companies.

⁴ Between January 1995 and the hearing in October 1996, Prebenda married and changed her last name to Dupuie. She will be referred to by her new name in this decision.

¹ All dates are in 1995 unless otherwise indicated.

² Respondent moved its offices from Farmington, Michigan, to Brighton, Michigan, at the end of 1995.

were not available but would be made available in the future.⁵ Dan McGuire had instructed Dupuie to inform Moss that these records were not yet available.

In fact, the payroll records of Steel Enterprises were in a storage room down the hall from the conference room containing the McGuire Steel and Dumas/McGuire records. These records included computerized payroll registers, check registers, canceled checks with carbons, and computerized timesheets. These records indicated that Local 25 members were paid for weekend overtime and some weekday overtime by Steel Enterprises. When paid through Steel Enterprises these members received \$26 per hour and nothing was paid into the union fringe benefit funds.⁶

On May 16, Union Attorney McKnight wrote Respondent's counsel renewing its request to review actual payroll records and timesheets for Steel Enterprises. McKnight and his law clerk, Michael O'Hearon, went to McGuire's offices to review these records on June 1. They were provided with the same summaries and timesheets that had been sent to the Union earlier and a number of W-2 forms (R. Exh. 1). Not all W-2s for Local 25 members were provided. Dan McGuire instructed Jennifer Dupuie to give McKnight only those W-2s that matched those employees listed on the summary sheets and those for office personnel.

On July 6, the Union filed an unfair labor practice charge alleging that since January 6, through the date of filing, Respondent had refused to provide the information it had requested. A few weeks later Union Attorney McKnight discussed the charge with Respondent's attorney, Harry

Eisenberg. When Eisenberg told him that all Steel Enterprises' payroll records had been provided, McKnight responded that this could not be the case because every company had a check register for its payroll account. Eisenberg denied that Steel Enterprises had such a register. The fact that Steel Enterprises did have a check register for its payroll account is established by the testimony of its controller, Gary Czarnik (Tr. 266, 283), as well as by Dupuie.⁷

Respondent provided the National Labor Relations Board with copies of some but not all canceled payroll checks and itemized statements of deductions on August 30. The Board provided these documents to the Union. Some time thereafter, Michael O'Hearon prepared a comparison of the amounts on the summaries and timesheets initially provided to the Union, the amounts listed on the W-2 forms, and the total amount of the checks provided for each employee (G.C. Exh. 5).

O'Hearon's comparison demonstrates that not all the information requested by the Union was provided. One need only look at the documents pertaining to two employees, Roger Luck and Randall Morse. As to Luck, his W-2 forms establish that Respondent had more documentation regarding his hours worked and salary paid than was provided the Union. The W-2s indicate that Steel Enterprises paid Luck \$10,215 in 1991; \$9634 in 1992, \$10,647 in 1993, and \$6644 in 1994. The summary provided indicates \$75.44 paid for 4 hours of work between June 1, 1991, and May 31, 1992 (Respondent's fiscal year); \$474.65 for 25 hours of work for fiscal year 1992-1993; and \$77.48 for 4 hours of work for fiscal year 1993-1994. Obviously there must have been documentation from which the W-2s were prepared.

On the summaries provided to the Union, Respondent reported that Steel Enterprises paid Randall Morse \$772.21 for 42 hours of work in fiscal year 1991-1992 and \$294.18 for 16 hours in fiscal year 1992-1993. His W-2 forms indicate \$250 paid in 1991; \$1612 in 1992; and \$208 in 1993. The canceled checks and check stubs provided do not equate with either the summaries or the W-2 forms.

Discussion

Upon request, an employer is obligated to provide to a union with which it has a collective-bargaining agreement, information that is relevant to the union's obligations to represent its members. *W-L Molding Co.*, 272 NLRB 1239, 1240-1241 (1984). Local 25's request for Steel Enterprises payroll records clearly falls into this category of data. The Union had an obvious need for information necessary to determine whether some of its members were receiving wages, on which contractually mandated fringe payments were not being made.

Respondent does not argue that the Union was not entitled to the information it requested. Instead, it argues that this information was provided. Respondent also argues that some of

⁵One issue in this case is the credibility of Jennifer Prebenda Dupuie, who worked for Respondent from May 1988 until February 1996. The last 6 years of her employment she was Respondent's human resources director. Dupuie quit voluntarily giving only 2 hours' notice. Respondent alleges that her testimony should be not be credited because she has a personal vendetta against Daniel McGuire. While Dupuie obviously has some sort of animus towards McGuire, I find that her credible for the following reasons:

1. Respondent contends that Dupuie's vendetta against McGuire is established by the fact that she copied McGuire's personal telephone and credit card bills and gave them to McGuire's fiancée just before she quit. I need not decide whether to credit McGuire's hearsay testimony that this in fact occurred. Even if this happened I see no reason to believe that whatever caused Dupuie to give McGuire's bills to his fiancée would cause her to lie under oath about his dealings with the Union.

2. Respondent also alleges, solely on the basis of Daniel McGuire's testimony, that several years before the hearing Dupuie stole money raised in some sort of contest in which the company was involved. It explains its failure to fire her as being the result of giving her the benefit of the doubt. I discredit this testimony because if Respondent actually believed Dupuie to be dishonest it would have fired her. In this regard, I note her duties included responsibility for a number of financial matters.

3. Respondent also notes that Dupuie's father is an attorney who represents unions. I see no reason to conclude that she would lie or fabricate events about McGuire's relationship with Local 25 for this reason.

4. Finally, I credit Dupuie because her testimony is corroborated on several important issues by Gary Czarnik, Respondent's controller. For example, Czarnik confirms that there was a payroll register for Steel Enterprises, Inc. Moreover, I find Dan McGuire's testimony contradicting her not to be credible.

⁶The Union's base rate is approximately \$19.8674 per hour. With fringe benefit payments an employee's compensation is higher than \$26 per hour.

⁷Czarnik also confirms that the computerized payroll and time records for Steel Enterprises were retrievable at least until Respondent's computers crashed in December 1995 (Tr. 283). Daniel McGuire was asked twice about the existence of a payroll register for Steel Enterprises. He testified initially that he did not know whether a master payroll register or check register ever existed for Steel Enterprises (Tr. 226). On cross examination, however, when asked if there ever was a payroll register for Steel Enterprises, he answered, "I'm sure there was" (Tr. 255).

the information that the Union now claims was withheld was never requested. I not only conclude that Respondent violated Section 8(a)(1) and (5) as alleged, I find its defenses to be frivolous.

Steel Enterprises had more payroll records than those Respondent provided to the Union. First, Dupuie's testimony, which I have credited, establishes that this is the case. Secondly, the Steel Enterprises W-2 forms for Local 25's ironworkers had to have been prepared from some other records. They were obviously not prepared from memory. Respondent's controller, Gary Czarnik, confirms that there were computerized payroll and time records for Steel Enterprises, at least up until December 1995.

Respondent contends that it made all the Steel Enterprises payroll records available to Ellen Moss on January 27, 1995, and that she chose not to review them because she was in a hurry. Even if I were to credit Respondent's testimony in this regard, which I do not, it was not relieved of its obligation to make these records available again. When McKnight and O'Hearon came to its offices on June 1, for example, McGuire was obliged to make all the Steel Enterprises payroll records available even if Moss had the opportunity to review them in January.

McGuire's counsel makes much of the fact that none of the Union's correspondence specifically mentioned a payroll register or check register. However, Greg Hicks' testimony, which is un rebutted, establishes that Samuel McKnight requested payroll registers or check registers at their initial meeting with Daniel McGuire. Respondent produced neither a payroll register nor a check register to the Union. Moreover, shortly after the charge in this matter was filed, McKnight discussed the existence of a check register for Steel Enterprises' payroll account with Respondent's attorney Harry Eisenberg. If there was any misunderstanding as to whether the Union was requesting a check register, this conversation cured it.

Finally, it was clear from the context of Respondent's conversations with the Union, that the Union was seeking whatever records Respondent possessed that indicated all payments made by Steel Enterprises to Local 25 members and the reason for those payments. This was apparent regardless of whether or not the words "payroll register or check register" were actually mentioned. Respondent had such records and never produced them to the Union or the Board.

CONCLUSION OF LAW

By refusing and failing to provide the Union with the presumptively relevant payroll records it requested, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Additionally, I recommend that the Union's request for an order that Respondent reimburse the Union for its litigation expenses be granted.⁸ Ordinarily the Charging Party is not

⁸The General Counsel did not request reimbursement of its litigation expenses.

entitled to reimbursement of litigation expenses. This remedy is only warranted in cases in which the Respondent's defenses are frivolous and not merely debatable. When Respondent's defenses are rejected upon resolutions of credibility they must be deemed to be debatable and such a case is not an appropriate one for the award of litigation expenses. *Heck's Inc.*, 215 NLRB 765, 768 (1974); *Care Manor of Farmington*, 318 NLRB 330, 331, 335 (1995); *Impressive Textiles*, 317 NLRB 8, 17 (1995).

I have credited the General Counsel's witnesses generally and with regard to facts disputed by Respondent's witnesses. However, the testimony of Respondent's witnesses establishes that it violated Section 8(a)(1) and (5) as alleged. Even if I were not to rely on any of the General Counsel's witnesses, the testimony of Respondent's controller, Gary Czarnik, establishes that there were Steel Enterprises payroll registers retrievable on June 1 and afterwards which were never provided to the Union as requested (Tr. 283). In the light of this evidence, I conclude that Respondent's contentions that it provided all the information requested is frivolous.

Moreover, Respondent intentionally failed to provide the information despite repeated requests by the Union. Its conduct was sufficiently egregious that I recommend that Respondent be ordered to pay the expenses of the Union incurred in the investigation, preparation, presentation, and conduct of the instant case, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses, and per diem and other reasonable costs and expenses. *Impressive Textiles*, supra at 8, 9, and 17.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, McGuire Steel Erection, Inc. and Steel Enterprises, Inc., Brighton, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to provide the Union with any information it has requested regarding payments made to bargaining unit members or other individuals by Steel Enterprises from June 1, 1991, to the present, including but not limited to payroll registers and check registers.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide the Union with the information described in paragraph 1(a) above.¹⁰

⁹If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹⁰Respondent contends that the information regarding Steel Enterprises prior to December 1995 is no longer retrievable through its computer system. It has not proved that to be the case. Moreover, these records also existed in tangible form and there is no evidence that the hard copy records do not still exist. Gary Czarnik looked for the Steel Enterprises records, including the check register, twice in 1996 and did not locate them (Tr. 266, 282). This evidence falls far short of establishing that these records no longer exist.

(b) On request, bargain collectively and in good faith with the Union and provide information requested by the Union as required by the Act.

(c) Pay to the Union the costs and expenses incurred in the conduct of the instant case in the manner set forth in the remedy section.

(d) Within 14 days after service by the Region, post at its facility in Brighton, Michigan copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms pro-

vided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The Respondent shall also duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 6, 1995.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

¹¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."